



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 180-00
23 February 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: FORMER [REDACTED],
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was permanently retired by reason of physical disability.
2. The Board, consisting of Mses. Humberd and Nofziger and Mr. Taylor, reviewed Petitioner's allegations of error and injustice on 10 February 2000 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.
3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.
 - b. Enclosure (1) was filed in a timely manner.
 - c. Petitioner was released from active duty on 6 December 1997, and transferred to the Temporary Disability Retired List the following day with a 50% rating under Department of Veterans Affairs (VA) code 8045-9304. He completed in excess of fourteen years of active duty service. He underwent a periodic physical examination on 13 July 1999. He reported that he was employed full-time in a supervisory position, and he denied any cognitive impairment. Psychological testing disclosed that he had problem solving difficulties, as well as memory deficits, e.g., he could not remember the name of the president who preceded President Bush. The examiners felt that his intelligence, while still in the normal range, had diminished significantly from his pre-morbid level. The examiners noted that although testing showed he had made great improvement, he still had significant cognitive impairment

that would prevent his from returning to full military duty at that time. On 31 August 1999 the Physical Evaluation Board made preliminary findings that he remained unfit for duty, and that his disability was ratable at 10%. Petitioner initially rejected those findings, and demanded a formal hearing; however, after consultation with his attorney, he withdrew his request and accepted the findings. On 14 December 1999, the President, PEB directed the Chief of Naval Personnel to effect his discharge from the Navy with entitlement to disability severance pay but without further benefits.

d. Petitioner contends, in effect, that he ultimately accepted the findings of the PEB, because he had been advised that there was little chance that his condition would be rated at 30% or higher, which was the minimum necessary for permanent retirement. He was also advised that if he were successful in obtaining a finding of fitness for duty, it was unlikely that he would be permitted to reenlist, which would result in his complete severance from the Navy without severance pay or any other benefit. He states that he was not aware of the extent of his memory deficits at that time, and that he was fired from his civilian job shortly after he accepted the findings of the PEB, because he had forgotten to do certain tasks he was required to do.

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board concludes that Petitioner should have been retired by reason of physical disability, vice discharged with entitlement to disability severance pay. In this regard, it notes that Petitioner was not fully aware of the deficits caused by his disability and, as a result, portrayed himself as being less impaired than he was. It concludes that the decrease in rating was based primarily on the PEB's acceptance of Petitioner's subjective assessment of his cognitive impairment, and the fact that he was working forty hours per week, rather than on the results of psychological testing, which indicate that significant impairment remained. The Board concludes that although Petitioner's condition did not meet all of the criteria for a disability rating of 30% under VA code 8045-9304, it was more severe than reflected by a 10% rating. It concludes that the 30% rating more closely approximates the degree of impairment caused by Petitioner's condition than does the 10% rating assigned by the PEB.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:


a. That Petitioner's naval record be corrected to show that he was not discharged from the Navy on 27 December 1999.

b. That Petitioner's naval record be further corrected to show that on 27 December 1999, he was permanently retired by reason of physical disability with a rating of 30% under VA code 8045-9304.

c. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder



JAMES R. EXNICIOS
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.



W. DEAN PFEIFFER
Executive Director